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CITATIONS

CASES:

Supreme Court of the United States

October Term, 1972

No. 71-1417

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND THE BOEING COMPANY

No. 71-1607

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

THE BOEING COMPANY, AND BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This brief *amicus,* in support of the position of Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 115 national and international labor unions having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

I

The first of the two questions presented here is whether § 8(b)(1)(A) of the National Labor Relations Act empowers the National Labor Relations Board to review union fines, enforceable in court, which have been imposed upon members who violate a valid union rule (here a prohibition on crossing a picket line during a strike), to determine whether those fines are excessive in amount.

This is the fifth case in the line stemming from *NLRB* v. *Allis-Chalmers,* 388 U.S. 175, raising an issue as to the scope of the Board's authority to oversee the process by which union members define the norms regulating the conduct of their affairs, develop procedures for the adjudication of alleged violations, and determine the scale of appropriate sanctions. See also *NLRB* v. *Marine & Shipbuilding Workers,* 391 U.S. 418; *Scofield* v. *NLRB,* 394 U.S. 423; *NLRB* v. *Granite State Joint Board,* ..... U.S. ....., 41 U.S.L.W. 4074 (Dec. 7, 1972). Moreover, in delineating the preemptive effect of the NLRA, this Court has repeatedly addressed itself to the interplay between § 8(b)(1)(A) and the state and federal (the Labor Management Reporting and Disclosure Act of 1959) law enforceable in court that regulates union discipline. See *Machinists* v. *Gonzales,* 356 U.S. 617; *Plumbers Union* v. *Borden,* 373 U.S. 690; *Iron Workers* v. *Perko,* 373 U.S. 701; *Boilermakers* v. *Hardeman,* 401 U.S. 233; *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274. This sustained attention to the ramifications of § 8(b)(1)(A) requires, as

the first step in analysis, an explication of the basic principles developed in those cases.

1. Initially, there can be no doubt that every aspect of the right to enact and enforce disciplinary rules is sharply circumscribed. The inhibitions on union action designed to assure that a member charged with an offense will be dealt with honestly, fairly, and in accordance with public policy, are comprehensive. The complex of public law, which includes § 8(b)(1)(A) as one of its strands, only "leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." *Scofield*, 394 U.S. at 430. And the injunction against unreasonable enforcement finds its major expression in the state law invalidating excessive penalties. "[S]tate courts, in reviewing the imposition of union discipline, find ways to strike down 'discipline [which] involves a severe hardship'." *Allis-Chalmers*, 388 U.S. at 193, n. 32. Thus we acknowledge at the outset that "a union rule * * * forbidding the crossing of a picket line during a strike," the subject matter here, must be "duly adopted and not the arbitrary fiat of a union officer," and can only be enforced "against voluntary union members by expulsion or a reasonable fine." *Scofield*, 394 U.S. at 428.

To state the full range and breadth of the substantive law both administrative and judicial, state and federal, however, is not to fix the metes and bounds of the prohibitions contained in § 8(b)(1)(A). The two are not coextensive. This Court, from the first, has recognized that in enacting that section Congress intended to grant the

Board a sharply restricted authority. "The protection of union members in their rights as members from arbitrary conduct by unions and officers has not been undertaken by [the] federal law [embodied in the NLRA], and indeed * * * [in] the proviso to § 8(b)(1) * * * the assertion of any such power has been expressly denied." *Gonzales,* 356 U.S. at 620. Section 8(b)(1)(A) and its proviso, in the Board's words, "precludes * * * [Board] interference with [the] internal affairs of a labor organization." *Minneapolis Star & Tribune Co.,* 109 NLRB 727, 729. Thus:

> "The fairness of an internal union disciplinary proceeding * * * can [not] be said to raise issues 'within the special competence' of the NLRB. See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181, 193-194 (1967). As we noted in that case, the 86th Congress which enacted § 101(a)(5) [of the LMRDA which guarantees procedural due process] was 'plainly of the view' that the protections embodied therein were new material in the body of federal labor law. 388 U.S., at 194. And that same Congress explicitly referred claims under § 101(a)(5) not to the NLRB, but to the federal district courts." *Hardeman,* 401 U.S. at 239.

Indeed, even the LMRDA, the statute in which "Congress did seek to protect union members in their relationship to the union by adopting measures to insure the provision of democratic processes in the conduct of union affairs and procedural due process to members subjected to discipline" (*Allis-Chalmers,* 388 U.S. at 194), is "more limited in scope than much state law" (*Hardeman,* 401 U.S. at 244, n. 11). While the LMRDA insures members charged with an offense procedural due process, and prohibits discipline for the exercise of freedom of speech or

assembly, it does not place any limitations on the sanctions which may be imposed on a member who has been found to have violated a valid union rule in a fair proceeding. It is therefore true today, as it has been throughout the evolution of our federal labor policy, that, in general, "the regulation of the relationship between union and employee is a contractual matter governed by local law" which constitutes a "federally unentered enclave." *Scofield* 394 U.S. at 426 n. 3.

2. The issue before the Court narrows then to determining the precise role § 8(b)(1)(A) was intended to fill in the overall regulation of union discipline.

As such early decisions as *Minneapolis Star & Tribune,* and *National Maritime Union,* 78 NLRB 971, 982-987 enforced 175 F 2d. 686 (C.A. 2), demonstrate, it has been understood from the outset that the primary function of § 8(b)(1)(A) is to prevent "the union from inducing the employer to use the emoluments of the job to enforce the union's rules," and to proscribe "union coercion, such as physical violence to induce employees to join the union or to join in a strike." *Scofield,* 394 U.S. at 428 n. 4, 429. And in *Allis-Chalmers* this Court:

> "essentially accepted the position of the National Labor Relations Board dating from Minneapolis Star & Tribune Co., * * * where the Board also distinguished internal from external enforcement, * * * in holding that a union could fine a member for his failure to take part in picketing during a strike but that the same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority." *Scofield* 394 U.S. at 428.

Thus, § 8(b)(1)(A) interdicts "means unacceptable in themselves, such as violence or employer discrimination," while leaving the regulation of "internal technique[s of enforcement such as] union fines, collected by threat of expulsion or judicial action" to the courts. *Id.* at 430-431.

There are two caveats, both necessary to preserve the overall integrity of the NLRA, to the proposition that so long as the union limits itself to "internal techniques" of enforcement, the Board has no regulatory role to play. As such recent cases as *Charles S. Skura,* 148 NLRB 679, and *NLRB* v. *Marine & Shipbuilding Workers,* 391 U.S. 418, demonstrate, even purely internal means of enforcement, such as expulsion, are subject to Board review to ascertain "the legitimacy of the union interest vindicated by the rule and the extent to which any policy of the Act may be violated." *Scofield,* 394 U.S. at 431. Union rules which interfere with the right of the Board to entertain charges, thereby "frustrat[ing] the enforcement scheme established by the statute" (*id.* at 430), are, therefore, beyond the ambit of "the internal affairs of the union" protected by § 8(b)(1)(A)'s proviso (*Marine & Shipbuilding Workers,* 391 U.S. at 425).

On the other hand, "as Allis-Chalmers and Marine Workers made clear, it does not follow from * * * the fact that the rule has and was intended to have an impact beyond the confines of the union organization * * * that the enforcement of the rule violates § 8(b)(1)(A), unless some impairment of a statutory labor policy can be shown." *Scofield,* 394 U.S. at 432. The NLRA is "not aimed at completely internal union discipline of union members, even though the discipline may result in the member's refusal to

accept work offered by the employer. Allis-Chalmers makes this quite clear." *Id.* at 435-436. The Act does not grant union members a right to work for a struck employer in violation of a union rule against strikebreaking. Internal union discipline "to protect against erosion, its status" as exclusive bargaining agent (*Allis-Chalmers,* 388 U.S. at 181) is permissible. While union-induced employer discrimination for crossing a picket line during a strike in violation of a union rule is proscribed because that means of securing the union's ends is "unacceptable in [it]self" (*Scofield,* 394 U.S. at 431); union fines enforceable in court for the same offense are lawful because both the end sought, and the means utilized, comport with the letter and policy of the Act. Thus, where the union rule in question is valid, the "policy of the Act is to insulate employees' jobs from their organizational rights" by assuring that as "an employee, he may be a 'good, bad, or indifferent' member so long as he meets the financial obligations of the union security contract; * * * but as a union member, so long as he chooses to remain one, he is subject to union discipline." *Id.* at 429 n. 5.

Finally, since its proviso only serves to carve Board regulation of the union-member relationship out of §8(b)(1)(A), enforcement of union rules against former members who have lawfully resigned is an unfair labor practice:

> "The *Scofield* case indicates that the power of the union over the members is certainly no greater than the union-member contract. Where a member lawfully resigns from a union and thereafter engages in con-

> duct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street." *Granite State,* 41 U.S.L.W. at 4075.

In sum, under the present regime, the Board is empowered to protect members from discipline through employer discrimination or violence, to assure that union discipline is not predicated on rules inconsistent with the NLRA's policies, and to preclude discipline of non-members. But that agency's mandate ends where the union acts against a "member as a member rather than as an employee" (*Wisconsin Motor Corp.,* 145 NLRB 1097, 1104), to vindicate a rule which is consistent with the NLRA's policies.

3. The central lesson of the legislative history of § 8(b)(1)(A), and the language of its proviso, is that "it was not the intent of the sponsors in any way to regulate the internal affairs of unions." *Allis-Chalmers,* 388 U.S. at 191-192. The law as summarized above is consistent with that intent. Section 8(b)(1)(A), as it has been interpreted thus far, interdicts "external" means of enforcement, measures union rules against external standards embodied in the NLRA, and prohibits the imposition of union sanctions against non-members, *i.e.* individuals external to the organization. On the other hand, the great bulk of union disciplinary proceedings are not subject to Board regulation. So long as the union confines itself to enacting rules which do not conflict with the NLRA, alleged

defects in the trial and punishment of a member as a member are solely for the courts.

If the phrase "internal union affairs" is to be given any content, it must include the processes designed to adjudicate alleged violations of valid union rules. It follows that if this core area is opened to Board review on a case-by-case basis, nothing is left of the Congressional intent to leave significant aspects of the union-member relationship unregulated by the NLRA. And it is plain from the list of criteria proposed by the court below[1] that a reading of § 8(b)(1)(A) which would require the Board to review the judgments reached by union trial boards to ascertain whether they have acted properly in assessing a fine enforceable in court does entail supervision of union discipline on a case-by-case basis. The factual combinations and permutations which must be considered under this standard are limitless and are all but impossible to capture in *per se* rules.

Nor is there any rational way to limit Board intrusion into union affairs to the review of the validity of the sanction imposed. There is nothing in the Act, and no overall scale of values, which justifies the conclusion that an

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[1] "The reasonableness of a fine would necessarily have to be determined in light of the circumstances leading to its imposition. Such factors as the compensation received by the strikebreakers, the level of strike benefits made available to the striking employees, the individual needs of the persons being disciplined for strikebreaking upon the effectiveness of the strike effort, the length of time of the work stoppage, the strength of the particular union involved, the availability of other less harsh union remedies, and many other similar considerations would clearly be relevant." Pet. App. 29.

"excessive" fine imposed after proper procedures is more subject to censure than a "reasonable" fine imposed without procedural due process. Indeed, the guidance Congress has given in Title I of the LMRDA indicates that while preservation of procedural due process is a federal concern, the scale of the sanctions imposed after a fair trial is not.

By the same token, there is no principled distinction which would draw the line at Board regulation of discipline in picket line cases. In *Allis-Chalmers* this Court was unanimous in recognizing "the validity of the union rule against its members crossing picket lines during a properly called strike * * *." 388 U.S. at 198 (Mr. Justice White, concurring). The argument for Board regulation of the size of a fine imposed for a violation of that rule must, therefore, proceed on the theory that "excessive" fines violate § 8(b)(1)(A) even though the union's ultimate object is entirely compatible with the policies of the Act. And if the substantive validity of the rule does not preclude Board jurisdiction in the instant cases, it follows that the Board also has the obligation to scrutinize the reasonableness of fines for wildcat activity, for participation in a breach-of-contract strike, and as *Minneapolis Star & Tribune* indicates (109 NLRB at 737), even for refusals to attend union meetings.

Thus, the rationale of the decision below completely undermines the distinction between "internal and external enforcement" of union rules developed by the Board, and "essentially accepted" by this Court (*Scofield*, 394 U.S. at 428), to express the congressional judgment that " 'purely internal union matters' [are] a subject the National Labor Relations Act leaves principally to other processes of law"

(*Lockridge*, 403 U.S. at 296). The closest the lower court came to providing a statutory predicate for this novel expansion of the Board's jurisdiction was the suggestion that "[w]here a disciplinary fine is unreasonably excessive, it may possibly affect the employee's employment status as adversely—and possibly even more adversely—as an illegally obtained employment suspension" and that such a result is contrary to the "protective policy of the Act" against penalties which would "impare the members status as an employee." Pet. App. 30a. But this is to misstate the policy of the Act. *Allis-Chalmers* squarely holds that the Act does not protect an employee against internal union discipline—including court-enforced fines—designed to "result in the member's refusal to accept work offered by the employer" (*Scofield*, 394 U.S. at 436). The policy of the Act this Court has deemed to be controlling is that "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent * * *." *Allis-Chalmers*, 388 U.S. at 181. This power plainly encompasses court-enforced fines for strikebreaking sufficient to secure complete compliance with the union's rule. For nothing less will achieve the objective sanctioned in *Allis-Chalmers*—the maintenance of strike solidarity through internal union discipline. To be sure the union is not permitted to achieve the same objective through union-induced employer actions against employees. But this limitation is not based on the view that union members who work for a struck employer despite their union's contrary rule are to be assured of a profit for their violation. Rather, it finds its roots in "the explicit wording of § 8(b)(2)" which was intended to "limit union power to compel an

employer to discharge a terminated member," but was not intended "to interfere with union self-government or to regulate a union's internal affairs." *Allis-Chalmers*, 388 U.S. at 195.

Allis-Chalmers is instinct with the proposition that internal union discipline to preserve strike solidarity is an "economic weapon" which "is part and parcel of the system" and which "acts as a prime motive power for agreements in free collective bargaining" (*NLRB* v. *Insurance Agents International*, 361 U.S. 477, 489). And the critical role played by "the presence of economic weapons in reserve" in the bargaining process has caused this Court to stress the point that neither the Board nor the courts are empowered to strike such weapons from the parties' hands without a specific warrant from Congress. Any other rule would allow an administrative agency, or the judiciary, to exercise a "considerable influence upon the substantive terms on which the parties contract" since "negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess." *Id.* at 490. The right acknowledged in *Allis-Chalmers*, for example, would be rendered meaningless if, as proposed by the court below, it could be whittled down to the point where union members would be assured that they will be better off if they violate the union's rules than if they obey them. Such "influence" is, therefore, forbidden because "our labor policy is not presently on a foundation of government control of the results of negotiations." *Insurance Agents*, 361 U.S. at 490. The national labor policy does not allow the Board, or the courts, "to introduce some standard of properly 'balanced' bargaining power, or some new distinction of justifiable and unjustifiable, proper and

'abusive' economic weapons into * * * the Act." *Id.* at 497-498; *see also, Porter Co.* v. *NLRB,* 397 U.S. 99, 102-104, 107-108. Thus, the statutory content the lower court would provide to elucidate the concept of excessive fines is based on a misunderstanding of what the NLRA is all about. Neither the state courts, if they are to regulate union fines on their own, or those courts and the Board in the exercise of concurrent jurisdiction, may disregard the paramount policy of the Act precluding the invalidation of a fine merely sufficient to secure "the member's refusal to accept work offered by the employer" (*Scofield,* 394 U.S. at 436). See *Insurance Agents,* 361 U.S. at 489-490, 497-498; *Bus Employees* v. *Missouri,* 374 U.S. 74; *Teamsters Union* v. *Morton,* 377 U.S. 252.

4. The legal analysis contained in the decision below is, as we have attempted to demonstrate, inadequate to sustain the result reached. That decision is, however, fully adequate in revealing the concerns that animated the court below. The arguments developed therein make it plain that the lower court believed that there should be a uniform federal law enforced by the Board which regulates all forms of union discipline that touch the employment relationship, and that this law should be grounded in a policy of protection for members who wish to work in violation of the union's rules.

"But Congress's policy has not yet moved to this point" (*Insurance Agents,* 361 U.S. at 500). The substantive law of § 8(b)(1)(A), as it stands, does not grant union members the right to violate union rules against crossing picket lines or exceeding production quotas, free of internal union discipline effective to secure "the members refusal to accept work offered by the employer" (*Scofield,* 394 U.S. at 436). Congress chose instead to simply prohibit enforcement of

valid union rules by union induced employer discrimination or violence. See pp. 5-8 *supra*.

Moreover, the decision to exclude Board oversight of internal techniques of enforcing union rules even though they relate to the employment relationship is no isolated anomaly. A case can be made for centralizing all aspect of labor law in a single federal statute enforced by a single tribunal staffed by government prosecutors. But Congress has chosen to provide the Board with a narrower range of questions to answer. The scope of unreasonable employer action detrimental to employees untouched by the NLRA is vast. It is captured in the rubric that employer discipline is not an unfair labor practice if imposed for good reason, bad reason, or no reason at all so long as it is not an anti-union reason. See, e.g., *NLRB* v. *Nabors*, 196 F.2d 272, 275 (C.A. 5) cert. denied 344 U.S. 865. And it is, of course, equally well settled that the parties are free to utilize "economically harassing" bargaining tactics not specifically prohibited without running afoul of the Act. See pp. 12-13 *supra*.

The foregoing are instances in which federal law does not condemn that which might well be condemned. But even where Congress chooses to interdict conduct logically related to that regulated by the NLRA it has not invariably chosen to entrust enforcement to the Board, even where the contrary decision entails the drawing of lines more nice than obvious. The classic example is the enforcement of collective agreements. The ultimate purpose of the NLRA, in the words of § 1, is to "encourag[e] the practice and procedure of collective bargaining." And §§ 8(a)(5), 8(b)(3) and 8(d) impose substantial continuing responsibilities on

the Board during a contract term. See *NLRB* v. *C&C Plywood Co.*, 385 U.S. 421. But in passing § 301, and rejecting the proposed § 8(a)(6) of S. 1126, 80th Congress, 1st Sess., "Congress determined that the Board should not have general jurisdiction over all alleged violations of collective bargaining agreements and that such matters should be placed within the jurisdiction of the courts." *C&C Plywood*, 385 U.S. at 427 (footnotes omitted).[2]

In short, both the specific language and legislative history of § 8(b)(1)(A) and the overall pattern of the Act support the Board's conclusion that:

> "The Board has long recognized that, as a practical matter, 'virtually all union rules affect a member's employment relationship.' However, given the legitimacy of the rule, the only question of relevance to the agency enforcing this Act is 'whether, in enforcing the rule, the Union goes outside the area of union-membership relationship and enters the area of employee-employer relationship.' The Union has not done so here, nor has it sought to vindicate a policy in conflict with the National Labor Relations Act, and the Act does not authorize this Board to evaluate the fairness of union discipline meted out to protect a legitimate union interest."

II

In *Granite State Joint Board*, this Court recognized that

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[2] This pattern of fragmenting responsibilities that might well be unitary is not confined to the allocation of jurisdiction between the Board and the courts. It is also a prominent aspect of the LMRDA. For example, regulation of union elections procedures is divided between Title I, enforceable by private suit, and Title IV enforceable solely by the Secretary of Labor. The resulting allocational problems were explored in *Calhoon* v. *Harvey*, 379 U.S. 134.

"under § 7 of the Act the employees have 'the right to refrain from any or all' concerted activities relating to collective bargaining or mutual aid and protection;" and that so long as "no problem of construing a union's constitution or bylaws defining or limiting the circumstances under which a member may resign from the union" is presented, the Board is "to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from association, as he sees fit 'subject to any financial obligations due and owing' the group with which he was associated." Thus "where, as [in Granite State], there are no restraints * * * [stemming from] the contractual relationship between union and member * * * on the resignation of members," the Court concluded that "the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May." 41 U.S.L.W. at 4075.

The Machinists Constitution now expressly provides, in a provision which took effect January 1, 1973:

> "Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 11 days preceding its commencement."

Moreover, at the time the instant case arose the Union's Constitution prohibited a member from "[a]ccepting employment in any capacity in an establishment where a strike * * * exists." And the Union has consistently interpreted this prohibition as requiring a member to abstain

from strikebreaking for the duration of an existing strike notwithstanding a mid-strike resignation.

The statutory question presented here is, therefore, whether a constitutional provision conditioning the right to resign union membership on a continuing commitment not to break a strike in progress (or in immediate contemplation), is valid under the proviso to § 8(b)(1)(A).[3]

Section 8(b)(1)(A) prohibits restraint and coercion of employees in the exercise of § 7 rights, and its proviso preserves "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *." The provision in the Machinists Constitution conditioning the right of members to resign during a strike on the continued commitment to the obligation, undertaken during membership, to respect the strike, is squarely within the proviso's language—it is a "rule with respect to the * * * retention of membership." Thus, to the extent that it can be said that this inhibition on resignation at will and free of all continuing obligations, restrains and coercises union members in the exercise of § 7 rights, it is precisely "[s]uch restraint and coercion [that] Congress permitted by adding the proviso to § 8(b)(1)(A)" (*Allis-Chalmers*, 388 U.S. at 198, Mr. Justice White concurring.)

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[3] The following question as to the proper construction of the Machinist's Constitution is also presented—whether, assuming arguendo that such provisions are valid, the provision in the Union's Constitution in force at the time the instant case arose, was sufficiently express to impose a restraint on post-resignation strikebreaking. This latter question is treated in detail in the Machinist's brief, and we incorporate the Union's discussion in this brief at this point as if it were our own.

Moreover, the Union's rule is one which can survive the most searching scrutiny as to "the legitimacy of the union interest vindicated by the rule and the extent to which any policy of the Act may be violated" (*Scofield*, 394 U.S. at 431).

The interest vindicated is that specified in *Allis-Chalmers*, 388 U.S. at 181; "to protect against erosion [the union's] status" as collective bargaining representative during the "vital [juncture] when the members engage in strikes." For:

> "To say that Congress meant in 1947 by the § 7 amendments and § 8(b)(1)(A) to strip unions of the power to fine members [who resign during a strike] for strike-breaking * * * is to say that Congress limited unions in the powers necessary to the discharge of their role as exclusive statutory bargaining agents by impairing the usefulness of labor's cherished strike weapon * * * [w]here the union is weak, and membership therefore of little value * * *." *Id.* at 183.

And the method chosen to vindicate that interest is perfectly consistent with the policy of the Act. *Granite State* holds that where the union's constitution is silent, the § 7 right to refrain from concerted activity protects the right to resign. But as *Allis-Chalmers* and *Scofield* demonstrate, the § 7 "right to refrain" does not grant union members the freedom to disregard the union's rules at will. It is not a license to join a union as a full member under one's own terms. For, § 7 also provides an equal right "to form [and] join * * * labor organizations." And an organization with rules that all may disobey is a contradiction in terms. It is an anarchy. The right to asso-

ciation to further common goals presupposes the right to enact and enforce membership obligations. "The Act clearly contemplates a membership organization and hence the existence of criteria for the acquisition, transfer, and loss of membership." Cf. *Ricci* v. *Chicago Mercantile Exchange,* ..... U.S. ....., 41 U.S.L.W. 4097, 4102 (Jan. 9, 1973). And to the extent this is not plain from § 7 itself, it is made explicit in the proviso to § 8(b)(1)(A). The § 7 right to refrain from concerted activity can not, therefore, be expanded to the outer limits of its logic; for if it were, it would render the § 7 right to engage in concerted activity, as amplified by the proviso to § 8(b)(1)(A), a nullity. This portion of the Act, like others:

> "represented the Congressional response to competing demands * * * Had Congress thought one or the other over-riding, it would doubtless have found words adequate to express that judgment. It did not do so; it accommodated both interests, doubtless in a manner unsatisfactory to the extreme partisans of each, by drawing a line it thought reasonable." *Local 1424 Machinists* v. *NLRB,* 362 U.S. 411, 418 n. 7.

That line has been marked out with precision in *NLRB* v. *UAW,* 320 F.2d 12, 15-16 (C.A. 1) where the court upheld a requirement, which limited resignation to a specified period during each year, intended to insure "uniform practices to preserve [the union's] financial standing by establishing reasonable times for resignations by those who were in good standing:"

> "Under Section 7 * * * the employee has indeed the unfettered right to abstain from indulging in union activity. He need not 'form,' 'join' or 'assist' a labor

> organization and * * * this inactivity cannot be the source of recriminations. It is by now too clear for citation that this facet of Section 7 was designed to prevent forcing the unwilling worker into a union.
>
> "However, we believe that it is quite another thing when the employee eschews his 'reluctance' and voluntarily joins a labor organization. At this point, under our view, the employee takes off the protective mantle of Section 7's 'refraining' provision and renders himself amenable to the reasonable internal regulations of the organization with which he chooses to cast his lot. * * *
>
> "In short, we believe that the Union's Constitution and By-laws—here relevant—were valid and viable provisions with which the employees had to comply if they desired to effectively sever their relationship with the Union. It is true that under section 7 of the Act * * * the subject employees need not have joined the Union. However, once they voluntarily took that step, they embraced not only the benefits but also the burdens which flowed from their union membership. One of those 'burdens' was the duty of comporting with the Union's reasonable internal regulations * * *."

In contrast, then, to the right to file charges with the Board, which is an absolute (*Marine & Shipbuilding Workers,* 391 U.S. at 425), the § 7 right to refrain from concerted activity, and the right to resign, which is derived therefrom, are qualified. While employees who voluntarily assume full membership, and by so doing subject themselves to the "provisions defining punishable conduct and the procedures for trial and appeal [that] constitute part of the contract between member and union" (*Allis-Chalmers,* 388 U.S. at 182), "are free to leave the union and escape the

rule" (*Scofield*, 394 U.S. at 430), that freedom is subject to reasonable union rules. And there can be no doubt that it is reasonable to condition resignation during, or in immediate contemplation of, a strike, on continued adherence to the union's rule against strikebreaking.

As already noted (p. 19 *supra*), the end sought—preservation of strike solidarity—is legitimate under *Allis-Chalmers*. And the restriction imposed on the members freedom of action is precisely attuned to the exact achievement of that end and no more. The individual's opportunity to determine whether he will engage, or refrain from engaging, in concerted activity takes precedence up to the point at which its exercise would destroy the group's opportunity to evaluate its true strength in making its final calculation as to whether to capitulate to the employer or commit itself to utilization of "the ultimate weapon in labor's arsenal for achieving agreement upon its terms," (*Allis-Chalmers*, 388 U.S. at 181). Even after that point the individual may dissolve all his ties to the union except the one essential to permit it to prosecute the strike. And, of course, the union's reservation of authority terminates at the end of the strike—the point at which the member's prior failure to resign can no longer be said to have induced a justifiable reliance on the continuing ability to discipline him for breaches of loyalty in the face of the enemy.

In sum, the Machinists rule conditioning the right to resign is an internal union rule within the literal language of the proviso to § 8(b)(1)(A) which is entirely compatible with the NLRA's policies. Under the principles developed in this Court's decisions from *Allis-Chalmers* to *Granite State* it is therefore lawful.

CONCLUSION

For the reasons stated above, as well as those stated by the Union, the judgment below should be reversed and the case remanded to the Court of Appeals with directions to affirm that part of the Board's order dismissing the portions of the complaint which rests on the alleged unreasonableness of the fines, and to set aside that part of the Board's order granting relief which rests on the conclusion that the Union may not discipline post-resignation strike-breaking by imposition of a court-collectible fine.

Respectfully submitted,

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